No. 06-

IN THE

Supreme Court of the United States

DANIEL TAYLOR JENKINS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Commissioner of Internal Revenue entitled to a blanket exemption from the application of the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb, *et seq.*, despite the absence of any such exemption in the statute and this Court's determination that blanket exceptions to RFRA should be neither inferred nor accepted on the basis of the government's generalized invocation of a need for uniformity in the administration of a federal program?

2. Can Ninth Amendment rights "retained by the people" be identified by examining liberties clearly existent at the time of the adoption of the Constitution and the Bill of Rights, as reflected in, for example, colonial and early state constitutions and legislation, so as to guarantee the right of conscientious objection to compelled participation in warfare that was well-established at the founding of this nation?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Jenkins v. Commissioner of Internal Revenue Service*, 483 F.3d 90 (2nd Cir. 2007). The Second Circuit affirmed the March 3, 2005 decision of the United States Tax Court, which is not officially reported. *See* Appendix.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1)

The Second Circuit's opinion was issued on March 6, 2007.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION FIRST AMENDMENT

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

UNITED STATES CONSTITUTION NINTH AMENDMENT

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Title 42 United States Code, Section 2000bb-1

Religious Freedom Restoration Act of 1993

§ 2000bb-1. Free exercise of religion protected

(a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person–

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief. A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

Title 42 United States Code, Section 2000cc-5 (7)(A)
Religious Land Use and Incarcerated Persons Act
Definition of "Religious Exercise"

(7) Religious exercise.

(A) In general. The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

STATEMENT OF THE CASE

1. This case involves a request that the Internal Revenue Service accommodate petitioner Daniel Taylor Jenkins's religious conscientious objection to coerced participation in warfare by allocating his federal income taxes to non-military purposes.

Daniel Jenkins filed an accurate and timely 2001 income tax return on April 14, 2002. He paid the self-employed social security portion of his federal tax obligation and explained in a letter addressed to the Commissioner that the remainder of the taxes owed were being held in escrow pending direction on how the funds could be directed to non-military government expenditures.

Daniel Jenkins does not ask to be excused from paying any part of his federal income taxes. **He requests an accommodation, not an exemption.** He gave up dominion over the disputed portion of his taxes by placing it in escrow at the time of filing his tax return, and he advised the Commissioner in writing that the funds were available for use for non-military expenditures. This accommodation is consistent with the manner

in which the Internal Revenue Service segregates social security tax payments and funds designated pursuant to the presidential campaign finance check-off program under 26 U.S.C. § 6096, as well as other special or specific purpose tax provisions. None have caused undue administrative burden to the IRS. Historically, accommodating Daniel Jenkins is comparable to the way in which conscientious objector commutation taxes were administered by the states when the militia system was in use and by the federal government when it conscripted persons to serve in the armed forces (during the Civil War).

Respondent Commissioner of Internal Revenue, the Tax Court and the Second Circuit did not question the sincerity of Daniel Jenkins's religious belief, nor did they dispute that the lack of governmental accommodation creates a substantial burden on the exercise of his faith.

The Commissioner offered no evidence to demonstrate that the refusal to accommodate Daniel Jenkins's religious belief is in furtherance of a compelling governmental interest, nor that there are no less restrictive means of furthering any such interest. Instead, the Commissioner, and the court below, resorted to a categorical approach. They simply assumed that the government is excused from showing that accommodation is not possible, feasible or even practical on the basis of an irrebutable presumption that there is no possible less restrictive means of administering tax collections. (The Commissioner and the courts below also mischaracterized the nature of Daniel Jenkins's request by asserting that he sought to "avoid" paying his taxes and, hence, that he was seeking an exemption or entitlement not to pay those taxes.)

2. The Tax Court had jurisdiction of the case pursuant to 26 U.S.C. § 6330(d), as petitioner had timely requested review

of an adverse determination of the Internal Revenue Service Office of Appeals regarding the escrowed portion of his taxes for the calendar year 2001.

REASONS FOR GRANTING THE PETITION

Whether the Commissioner of Internal Revenue is entitled to a blanket exemption from the application of the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb, *et seq.*, presents an important question of federal law that has not been, but should be, settled by this Court. The court of appeals has decided this question in a way that is facially inconsistent with the plain language of the statute and that conflicts with this Court's decisions explaining the scope and effect of RFRA and the related Religious Land Use and Incarcerated Persons Act, 42 U.S.C. § 2000cc-5, *et seq.* The lower court's interpretation of RFRA also conflicts with the analysis and application of the statute by courts of other circuits.

The rejection by the court of appeals of petitioner's argument and evidence under the Ninth Amendment presents a question of fundamental constitutional interpretation that has not been, but should be, considered by this Court. There has been little explication of the Ninth Amendment by this Court or lower federal courts. Petitioner proposes an analytical approach that is consistent with the language of the Amendment and the original intent of the Founders, and that is narrow, clear and capable of practical judicial application. Daniel Jenkins's protected liberty interest is demonstrated by the extensive history of state constitutional and statutory guarantees of a right of conscience against compelled military participation at the time of the adoption of the Constitution and Bill of Rights.

I. REVIEW IS WARRANTED TO RESOLVE IMPORTANT QUESTIONS RELATING TO THE APPLICATION AND CONSTRUCTION OF THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993.

In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), the government argued that "it has a compelling interest in the *uniform* application of the Controlled Substances Act", *id.* at 423 (emphasis in original), which precludes any inquiry into whether accommodating the requested religious exception for ceremonial use of a Schedule I hallucinogen "would seriously compromise its ability to administer the program." *Id.* at 435. This Court emphatically rejected the government's "categorical approach" and directed that the government must establish on a case-by-case basis that it cannot accommodate a request based on religious conscience:

> RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach. RFRA requires the Government to demonstrate that the compelling interest test is satisfied through the application of the challenged law "to the person" – the particular claimant whose sincere exercise of religion is being substantially burdened. . . . [W]e must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing the claimed . . . exemption.

Id. at 430-431 (internal quotation marks omitted).

This Court rejected the suggestion that only Congress, and not the federal courts, should engage in crafting exceptions to federal laws of general application. *Id.* at 434 ("RFRA, however, plainly contemplates that *courts* would recognize exceptions – that is how the law works. *See 42 U.S.C. § 2000bb-1(c).*"). And the Court soundly rejected the contention that generalized fears about theoretical administrative burdens could justify refusing to consider a specific request for accommodation:

> Here the Government's argument for uniformity . . . rests not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law. The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to "rules of general applicability." 42 U.S.C. § 2000bb-1(a). Congress determined that the legislated test "is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." § 2000bb(a)(5).

Id. at 435-436.[1]

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1. The Court has analogously directed that this type of searching individualized adjudication is required under the similar language of the Religious Land Use and Incarcerated Persons Act. *Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005) (Holding section 3 of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1(a)(1)-(2), to be constitutional and remanding for development of a (Cont'd)

In this case, the court below disdained undertaking any examination of "the application of the challenged law 'to the person'"; or of any "interests that the State seeks to promote"; or of any "impediment to those objectives that would flow from recognizing" Daniel Jenkins's request for accommodation. It rejected that RFRA or this Court's precedent require a fact-specific, individualized inquiry on the basis of the conclusion in prior decisions that "tax exemptions are a matter of legislative grace...." *Adams v. Commissioner of Internal Revenue*, 170 F.3d 173, 180 (3d Cir. 1999), *cert. denied*, 528 U.S. 1117 (2000).

Daniel Jenkins attempted to focus the courts below on specific evidence that accommodating his conscience would not be unduly burdensome to the Internal Revenue Service. The court of appeals summarily dismissed his arguments on the basis that *United States v. Lee*, 455 U.S. 252 (1982), establishes that no accommodation is required under the Free Exercise Clause of the First Amendment. Relying on a prior decision of the Second Circuit and one by the Third Circuit,[2] which each in

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factual record): "A finding that it is *factually impossible* to provide the kind of accommodations that RLUIPA will require without significantly compromising prison security or the levels of service provided to other inmates cannot be made at this juncture." (internal quotation marks omitted; emphasis in original).

2. The decisions cited by the court below are *Adams v. Commissioner of Internal Revenue*, 170 F.3d 173 (3d Cir. 1999), *cert. denied*, 528 U.S. 1117 (2000), and *Browne v. United States*, 176 F.3d 25 (2d Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000). In *Adams*, the Third Circuit concluded that "the nature of the compelling interest involved – as characterized by the Supreme Court in *Lee* – converts the least restrictive means inquiry into a rhetorical question that has been answered by the analysis in *Lee*." 170 F.3d at 179. And in *Browne*, the Second Circuit rejected the plaintiff's RFRA claim simply on the basis of *Adams*. 176 F.3d at 26.

turn relied on *United States v. Lee*, the court below concluded it is "well settled that RFRA does not afford a right to avoid payment of taxes for religious reasons." 483 F.2d at 92.[3]

United States v. Lee involved a request by an Amish employer for exemption from social security taxes for himself and his employees. This Court noted that "any exemption from payment of the employer's share of social security taxes must come from a *constitutionally required exemption*." *Id.* at 256 (emphasis added). Daniel Jenkins's petition, then, presents the question whether the constitutional standard established in *United States v. Lee* is conclusively determinative of statutory analysis under RFRA. The Court has not directly addressed that question.

The Second Circuit's conclusion flies in the face of the clear language of RFRA and its elucidation by this Court.

RFRA contains no exemption for tax laws. When Congress wishes to exempt the tax system from the scope of other general legislation, it knows how to do so. *See, e.g., Anti-Injunction Act*, 26 U.S.C. § 7421(a) ("no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person. . . ."). It chose not to exempt the federal tax system from accommodations required under RFRA. Congress's unambiguous legislative decision should be given full effect by the courts. *Bedroc Limited, LLC v. United States*, 541 U.S. 176, 183 (2004).

This Court emphasized in *O Centro Espirita* that blanket exceptions to RFRA should be neither inferred nor accepted on

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3. Again, Daniel Jenkins does not seek to "avoid" payment of his taxes. He seeks an accommodation that will permit him to pay his taxes consistently with the dictates of his faith.

the basis of the government's generalized invocation of a need for uniformity in the administration of a federal program. *Certiorari* should be granted to resolve whether, in the face of the plain language of the statute and this Court's pronouncements, the tax system should be accorded a judicially-created *per se* exemption from RFRA, as the Second Circuit held.

Prior to the Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), requests for accommodation under the Free Exercise Clause were sometimes subjected to a form of individualized scrutiny elucidated in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Some Circuit Court decisions have indicated that Congress intended in RFRA only to reinstate the so-called *Sherbert-Yoder* test. *E.g., Jefferson v. Lappin*, 2006 U.S. App. LEXIS 31931 (DC Cir. 2006) ("the strict scrutiny standard set forth in the RFRA in no way differs from the strict scrutiny test this and other courts have long applied under the *First Amendment*."); *Adams v. Commissioner of Internal Revenue*, 170 F.3d 173, 180 (3d Cir. 1999), *cert. denied*, 528 U.S. 1117 (2000) ("the result this court reaches in evaluating her particular [RFRA] challenge is dictated by prior [Free Exercise Clause] case law."). This case and the other perfunctory decisions of the Second and Third Circuits refusing to apply the individualized strict scrutiny mandated by RFRA's plain language to cases involving federal tax administration fall into this category. *Jenkins v. Commissioner of Internal Revenue Service*, 483 F.3d 90 (2nd Cir. 2007); *Adams v. Commissioner of Internal Revenue*, 170 F.3d 173 (3d Cir. 1999), *cert. denied*, 528 U.S. 1117 (2000); *Browne v. United States*, 176 F.3d 25 (2d Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000).

This Court, however, has determined that RFRA does not simply incorporate the individualized scrutiny standards of *Sherbert* and *Yoder*. Rather, "the Act imposes in every case a least restrictive means requirement – a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify. . . ." *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997).

Other Circuit Courts also have held that RFRA provides greater protection for religious conscience than required by this Court's pre-*Smith* constitutional free exercise decisions. Those courts have noted, among other differences, that the First Amendment forbids "prohibiting" the free exercise of religion, while RFRA forbids "burdening" religion; that the "least restrictive means" requirement uniformly imposed by RFRA was not part of the pre-*Smith* jurisprudence; that RFRA applies to all cases, while pre-*Smith* constitutional analysis had exempted some entire classes of governmental activity from the *Sherbert-Yoder* test's heightened scrutiny; and that RFRA employed a broader definition of "exercise of religion" after amendment in 2000 than had been utilized in this Court's interpretation of the Free Exercise Clause. *E.g., Navajo Nation v. United States Forest Service*, 479 F.3d 1024, 1032-1033 (9th Cir. 2007); *Spratt v. Rhode island Department of Corrections*, 482 F.3d 33, 41 n. 12 (1st Cir. 2007) (Interpreting RLUIPA).

Daniel Jenkins's petition should be granted so that the Court can resolve the conflict between this Court's determination and the Second Circuit's understanding of RFRA, as well as the conflict among the Circuits.

Moreover, in *Employment Division v. Smith*, the Court explained that

> [t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the right of parents . . . to direct the education of their children.
> . . .

494 U.S. at 881. In other words, to the extent that RFRA incorporates standards of individualized scrutiny from *Sherbert* and *Yoder*, those standards were *not* even applicable in *United States v. Lee*.

The most that can be said of *United States v. Lee* and the other decisions cited by the court below is that accommodations of religious conscience that affect tax administration are not constitutionally required by the Free Exercise Clause of the First Amendment. RFRA does not apply a "constitutionally required" standard, though, and applications of RFRA to particular statutes and persons do not raise concerns that animate constitutional jurisprudence. *Cf. Employment Division v. Smith, supra,* 494 U.S. at 888-890 ("But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required. . . .").

In short, *United States v. Lee* reached a constitutional conclusion that the free exercise of religion protected by the First Amendment did not compel the government to accommodate taxpayers because (1) the First Amendment did

not require accommodations to federal statutes of general application, and (2) the Court believed that "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Id.* at 260. Those considerations no longer hold. RFRA does not involve constitutional analysis, and its standards for refusing to accommodate religious exercise are more demanding than those applied in *United States v. Lee* and its progeny. Congress has shown by its subsequent acts, such as expanding the exemption of the Amish from social security taxes in response to *Lee*[4] and the presidential campaign finance check-off program,[5] that exceptions to the uniform application of the Internal Revenue Code based on sincere religious conscience do not necessarily undermine the tax system. RFRA entails consideration of accommodating the religious conscience of *individuals*, while *Lee* was concerned with exempting *denominations*. And this Court has made it clear that Congress's direction to the Federal Courts to adjudicate requests for accommodation on a case-by-case basis under the standards set forth in RFRA should be fully honored for *all* federal statutes.

RFRA provides a means for harmonizing an individual's relationship to government and to God. Congress concluded that the federal government should actively adopt accommodations that permit the individual to be both loyal to

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4. After the *Lee* decision, Congress expanded the social security tax exemption to include Amish employers, like Mr. Lee, and their employees without any apparent damage to the federal tax system. Technical and Miscellaneous Revenue Act of 1988, Public Law 100-647, Section 8007 (1988), adding Section 3127 of the Internal Revenue Code, 26 U.S.C. § 3127.

5. 26 U.S.C. § 6096.

his country and faithful to his God. The categorical judicial exemption of the tax system from this statutory duty undermines the legislature's intent. It denigrates RFRA's specific directive to minimize the extent to which a person will be forced to choose between obedience to his government and obedience to his faith.

For all these reasons, the petition should be granted so that the Court can determine the applicability of RFRA to tax issues, and resolve a conflict between the Circuit Courts.

II. REVIEW IS WARRANTED TO RESOLVE IMPORTANT QUESTIONS RELATING TO THE APPLICATION OF THE NINTH AMENDMENT TO THE RIGHT OF CONSCIENTIOUS OBJECTION IN EXISTENCE AT THE TIME OF THE FOUNDING OF THE UNITED STATES.

Below, Daniel Jenkins sought to present an argument that conscientious objection to participation in warfare was a liberty right recognized in colonial constitutions and statutes and, accordingly, within the intended scope of the Ninth Amendment's reservation of "rights retained by the people."

Ninth Amendment jurisprudence is not well developed. This Court has acknowledged that the Amendment has meaning and vitality[6] and that persons possess liberty rights beyond those

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6. *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 488, 491 (1965) (Goldberg, J., *concurring*):

> The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from government infringement, which exist alongside those fundamental

(Cont'd)

specifically mentioned in the United States Constitution and amendments,[7] while also seeking to locate unenumerated rights in the text of other Amendments.[8] Members of the Court have explored the Founders's intention in including the Ninth Amendment and its possible application in particular situations,[9]

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> rights specifically mentioned in the first eight constitutional amendments. . . . To hold that a right so basic and fundamental and so deeply rooted in our society . . . may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.

7. *E.g., Planned Parenthood v. Casey*, 505 U.S. 833, 848 (1992) ("Neither the Bill of Rights nor the specific practices of states at the time of the adoption of the 14th Amendment marks the outer limits of the substantive sphere of liberty which the 14th Amendment protects. *See* U.S. Const., Amdt. 9."); *Poe v. Ullman*, 367 U.S. 497, 541, 543 (1961) (Harlan, J., *dissenting*)

8. *E.g., Roe v. Wade*, 410 U.S. 113, 153 (1973):

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

See also Whelan v. Roe, 429 U.S. 589, 600 (1977).

9. *E.g., Massachusetts v. Upton*, 466 U.S. 727, 737 (1984) (Stevens, J., dissenting) ("The Ninth Amendment, it has been said, states but a truism. But that truism goes to the very core of the constitutional

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but this Court as a whole has never had reason to develop workable standards for determining the types of unenumerated liberties it protects.

Ninth Amendment scholars propose giving content to its promise to preserve unenumerated rights by looking to this country's history and tradition. For example, in *The Tempting of America: The Political Seduction of the Law* (The Free Press 1990), Robert Bork observes that

> [t]he Ninth Amendment appears to serve a parallel function [to the Tenth Amendment's guarantee of federalism] by guaranteeing that the rights of the people specified already *in the state constitutions* were not cast in doubt by the fact that only a limited set of rights was guaranteed by the federal charter.

Id. at 185 (emphasis added). Others also have argued that retained rights can be identified by examining liberties clearly existent at the time of the adoption of the Constitution and the Bill of Rights, as reflected in, for example, colonial and early state constitutions and legislation.[10]

(Cont'd)
relationship between the individual and governmental authority, and, indeed, between sovereigns exercising authority over the individual."); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579 & n. 15 (1980) (opinion of Burger, CJ); *Palmer v. Thompson*, 403 U.S. 217, 233 (1971) (Douglas, J., dissenting) ("The 'rights' retained by the people within the meaning of the Ninth Amendment may be related to those 'rights' which are enumerated in the Constitution.").

10. *See, e.g.*, Randy E. Barnett, *Restoring the Lost Constitution* (Princeton Univ. Press 2004); Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, Boston University School of Law Working (Cont'd)

In accordance with this approach, Daniel Jenkins seeks to offer evidence that the individual right of religious conscience not to be compelled to participate in or support military activity was well recognized at the founding of this nation. For example, the New York State Constitution of 1777, which predates and is independent of the United States Constitution and the Bill of Rights, expressly protects persons with "scruples of conscience" from forced military service and requisition for armament.[11] The constitutions of other colonial states also contain liberty of conscience guarantees and religious exemptions from the "bearing of arms".[12] This constitutional right of conscientious objection was preserved by the states at least until the formation

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Paper 05-14, August 24, 2005, www.bu.edu/law/faculty/papers/BarnettR082405abstract.html; Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 Va. L. Rev. 223, 259 (1983).

11. New York State Constitution of 1777, Article XL; in Charles Z. Lincoln, *The Constitutional History of New York* (Lawyers Co-Op. Publ. Co. 1906), Vol. I, at 186; available at: *http://www.yale.edu/lawweb/avalon/states/ny01.htm*. Article XL states:

> That all such of the inhabitants of this state (being of the people called Quakers) as, from scruples of conscience, may be averse to the bearing of arms, be therefrom excused by the legislature, and do pay to the state such sums of money, in lieu of their personal service, as the same may, in the judgment of the legislature, be worth.

12. *See, for example,* Constitution of the Commonwealth of Pennsylvania of 1776, Art. 2 & 8, *http://www.yale.edu/lawweb/avalon/states/pa08.htm*; Constitution of the State of Vermont of 1777, Art. 3 & 9, *http://www.yale.edu/lawweb/avalon/states/vt01.htm*; Constitution of the State of New Hampshire of 1784, Art. 4, 5 & 13, *http://nh.gov/constitution/billofrights.html*.

of the first permanent national army. It was also preserved and protected by the actions of the early Congress[13] and by the Civil War Congress that instituted the first federal universal military service draft.[14]

Accordingly, there is a substantial basis to conclude that a right of conscience not to be compelled to participate in warfare was "retained by the people" from before the founding of the federal government. The Ninth Amendment was intended to respond to concerns that the enumeration of specific rights in the first eight amendments could be interpreted to negate the existence and continuing vitality of other, unstated liberties. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 (1980) (opinion of Burger, C.J.). It would be ironic indeed

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13. On May 8, 1792, Congress passed "An Act more effectually to provide for the National Defense by establishing a Uniform Militia throughout the United States." Act of May 8, 1792, § 1, 2nd Cong., 1st Sess., Ch. 33; in Richard Peters, ed., *The Public Statutes at Large of the United States of America from the Organization of the Government in 1789 to March 3, 1845* (Little & Brown 1845), Vol. I, at 271-272. This is the first national legislation enacted concerning military service. It included an exemption for "all persons who now are or may hereafter be exempted by the laws of the respective states. . . ."

14. In March 1863 and February 1864, Congress adopted acts exempting from service "members of religious denominations, who shall by oath or affirmation declare that they are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice of said religious denominations. . ." and providing that the commutation fee to be paid for exemption from military service was "to be applied to the benefit of the sick and wounded soldiers." Act of Feb. 24, 1864, ch. 13, § 17, 13 Stat. 6, 9. *See United States v. Philadelphia Yearly Meeting of the Religious Society of Friends*, 322 F. Supp. 2d 603, 605 (ED Pa. 2004).

if the lack of a standard for identifying and delimiting these retained rights becomes the justification to deny their existence.

Liberty of conscience was a preeminent, perhaps the paramount, factor motivating the earliest settlers to leave their homelands and to venture across a foreboding ocean to make new lives on this continent. That preeminence poured into the founding governing documents of the colonies, the states and the nation. Its enduring legacy has attracted people to our shores for over two hundred years and made this country the international model of liberty.

In no small part due to the example of this nation and its people's leadership, freedom of religious conscience has become an established fundamental universal human right. *The American Declaration of the Rights and Duties of Man* was adopted by the Organization of American States (OAS) at Bogota, Columbia by the Ninth International Conference of American States in April 1948. It declares in Article III that "[e]very person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private" and in Article XVIII promises every person access to the courts to ensure respect for this right. *The Universal Declaration of Human Rights* was adopted by the United Nations General Assembly in December 1948. It declares that "[e]veryone has the right to freedom of thought, conscience and religion. . ." and directs that these rights be effectively protected by national tribunals. UDHR, Articles 18 & 8. *The International Covenant on Civil and Political Rights* was concluded in New York in 1966, and was signed by the United States in 1977 and ratified by the Senate in 1992. It too guarantees that "[e]veryone has the right to freedom of thought, conscience and religion. . ." and endorsing nations agreed to provide effective judicial remedies to protect these rights. ICCPR, Articles 18 & 2. And on January 23, 2007, the United

Nations Human Rights Committee sustained the claims of South Korean Jehovah's Witnesses under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights that the refusal of South Korea to accommodate their conscientious objection to participation in the military was a violation of the guarantees of conscience and religion in Article 18.[15] The international recognition of rights of conscience further confirms that conscientious objection to coerced participation in warfare is a right properly understood as reserved to the people by the Ninth Amendment.

For all these reasons, this Court should grant the petition to resolve important questions regarding the interpretation and application of the Ninth Amendment.

CONCLUSION

For the foregoing reasons, petitioner Daniel Taylor Jenkins respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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15. *Mr. Yeo-Bum Yoon and Mr. Myung-Jin Choi v. Republic of Korea*, CCPR/C/88/D1321-1322/2004 of 3 January 2007 (UN Human Rights Commission), http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/26a8e9722d0cdadac1257279004c1b4e?Opendocument.

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED AND FILED MARCH 6, 2007

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2006

(Argued: February 22, 2007 Decided: March 6, 2007)

Docket No. 05-4756-ag

DANIEL TAYLOR JENKINS,

Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE,

Respondent-Appellee.

Before KEARSE, CABRANES, and KATZMANN, *Circuit Judges*.

JOSÉ A. CABRANES, *Circuit Judge*.

We consider here the claim that religious objections to military activities or spending may form the basis for avoiding the payment of federal taxes. The claim is not new,[1] although it is presented in somewhat unusual garb.

1. *See, e.g.*, *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) (holding that the First Amendment does not afford members of the Amish sect a right to avoid payment of social (Cont'd)

Appendix A

Petitioner Daniel Taylor Jenkins, a religious objector to military spending, appeals a decision of the United States Tax Court granting respondent Commissioner of Internal Revenue's motion for summary judgment under Rule 121 of the United States Tax Court Rules of Practice and Procedure.[2] The Tax Court dismissed petitioner's amended petition, in which he claimed that the First and Ninth Amendments of the United States Constitution[3] afford him a right to retain

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(Cont'd)
security taxes); *Browne v. United States*, 176 F.3d 25 (2d Cir.1999) (holding that taxpayers cannot withhold the portion of their taxes which they calculate will be allocated for military purposes); *Adams v. Comm'r*, 170 F.3d 173 (3d Cir.1999) (holding that the government need not accommodate taxpayers whose religious beliefs lead them to oppose military funding); *United States v. Ramsey*, 992 F.2d 831, 833 (8th Cir.1993) (holding that the First Amendment does not afford a right to avoid federal income taxes on religious grounds); *Jenney v. United States*, 755 F.2d 1384 (9th Cir.1985) (holding that taxpayers cannot withhold taxes based on conscientious objection to war); *Lull v. Comm'r*, 602 F.2d 1166, 1169 (4th Cir.1979) (same).

2. Tax Court Rule 121 provides in pertinent part,

> A decision shall . . . be rendered [upon motion for summary judgment] if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials . . . show that there is no genuine issue as to any material fact and that a decision may be rendered as a matter of law.

Tax Ct. R. 121(b).

3. The First Amendment states, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting (Cont'd)

the unpaid portion of his taxes on the basis of religious objections to military spending until such taxes can be directed to nonmilitary expenditures. The Tax Court also imposed a penalty of $5,000 pursuant to 26 U.S.C. § 6673(a)(1) based on its conclusion that petitioner's arguments were frivolous within the meaning of the statute.[4]

On appeal, petitioner argues that the Tax Court erred in (1) dismissing his claim that the First and Ninth Amendments afford him a right to withhold a portion of his taxes on account of his religious objections to military expenditures; (2) failing to determine whether accommodating his religious objections would be unduly burdensome under the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C.

(Cont'd)
the free exercise thereof." U.S. Const. amend. I. The Ninth Amendment states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.

4. 26 U.S.C. § 6673(a)(1) provides,

> Whenever it appears to the Tax Court that—
>
> (A) proceeding before it have been instituted or maintained by the taxpayer primarily for delay,
>
> (B) the taxpayer's position in such proceeding is frivolous or groundless, or
>
> (C) the taxpayer unreasonably failed to pursue available administrative remedies,

the Tax Court, in its decision, may require the taxpayer to pay to the United States a penalty not in excess of $25,000.

§§ 2000bb *et seq.*; and (3) assessing a penalty for raising frivolous claims pursuant to 26 U.S.C. § 6673.

Although we do not doubt the sincerity of petitioner's religious convictions, we conclude that his legal arguments are without merit. It is well settled that the collection of tax revenues for expenditures that offend the religious beliefs of individual taxpayers does not violate the Free Exercise Clause of the First Amendment. *See United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) (holding that Amish taxpayers cannot avoid payment of social security taxes under the First Amendment based on religious objections to participation in the social security system); *Browne v. United States*, 176 F.3d 25 (2d Cir.1999) (holding that the First Amendment does not afford a right to withhold the portion of an individual's tax liability that would be allocated to the Department of Defense).

It is similarly well settled that RFRA does not afford a right to avoid payment of taxes for religious reasons. *Browne*, 176 F.3d at 26 (rejecting RFRA claim on the ground that "voluntary compliance is the least restrictive means by which the IRS furthers the compelling governmental interest in uniform, mandatory participation in the federal income tax system"); *see also Adams v. Comm'r*, 170 F.3d 173, 176 (3d Cir.1999) (same). Therefore, we need not discuss in detail the arguments to the contrary that are raised in petitioner's brief.[5]

5. We merely note our disagreement with petitioner's assertion that the Supreme Court's recent decision in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S.Ct. 1211, (Cont'd)

Appendix A

We conclude that petitioner's Ninth Amendment claim is also without merit. The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. The Ninth Amendment is not an independent source of individual rights; rather, it provides a "rule of construction" that we apply in certain cases. *See United States v. Bifield*, 702 F.2d 342, 349 (2d Cir.1983). The rule dictates that the "[t]he full scope of the specific guarantees [in the Constitution] is not limited by the text, but embraces their purpose." *Id.*

Petitioner argues that the Ninth Amendment supports his asserted right to withhold payment of taxes that would be used for military spending. He relies on, *inter alia*, various eighteenth and nineteenth century provisions in the laws and

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(Cont'd)

163 L.Ed.2d 1017 (2006) breathes new life into his otherwise unsuccessful argument under the Religious Freedom Restoration Act of 1993. In *O Centro Espirita* the Court held that the government had not demonstrated a compelling interest in the uniform application of the Controlled Substances Act to prohibit religious uses of an otherwise illegal drug. 126 S.Ct. at 1225. Although the Court in *O Centro Espirita* rejected the government's "categorical approach" to assessing the relevant religious burdens, it explicitly contrasted the claims at issue in *O Centro Espirita* with unsuccessful constitutional claims brought by taxpayers seeking to withhold taxes on religious grounds. *See id.* at 1223 (noting that *Lee* and other cases rejecting efforts to withhold payment of taxes "show that the Government *can* demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program") (emphasis added).

the Constitution of the State of New York,[6] and several acts of the United States Congress,[7] which accommodated religious observers who objected to military service, or exempted religious objectors from paying taxes that would be used for military expenditures. *See* Petitioner's Br. 16-22. Petitioner argues on the basis of these provisions that "the right of conscience not to be compelled to participate in war making" was "an element of religious freedom at the time of the adoption of the United States Constitution and the Bill of Rights." *Id.* at 14-15. He therefore argues that the Tax Court erred when it failed to consider whether a right to withhold the portion of his taxes allocable for military spending "could be discerned in the First Amendment's prohibition of abridging the free exercise of one's faith *as elucidated by the Ninth Amendment's 'rule of construction,'*" *id.* at 14 (emphasis added).

Petitioner's Ninth Amendment argument fails because it amounts to a mere recasting of his unsuccessful First Amendment claim. His argument that the right to withhold the payment of taxes was an element of "religious freedom at the time of the adoption of the United States Constitution" is rooted in petitioner's historical interpretation of the principles embodied by the Free Exercise Clause. The argument is squarely foreclosed, however, by the Supreme

6. *See, e.g.* Act of Apr. 15, 1814, ch. 200, Art. XXIII, 1814 N.Y. Laws 251, 253 (providing that money received from Quakers would not be used to support the state militia but would instead be allocated for educational and charitable purposes).

7. *See, e.g.*, Act of May 8, 1792, ch. 33, § 2, 1 Stat. 271, 272 (requiring enrollment in federal militia but exempting all persons subject to exemptions under state law).

Court's decision in *United States v. Lee.* In *Lee*, the Court considered claims by a member of the Amish faith that the assessment of social security taxes interfered with the right to practice his religion as guaranteed by the Free Exercise Clause. 455 U.S. at 255-57, 102 S.Ct. 1051. The Court rejected the petitioner's arguments, concluding that "[b]ecause the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes *affords no basis* for resisting the tax." *Id.* at 260, 102 S.Ct. 1051 (emphasis added). Indeed, the Court in *Lee* noted, albeit in dicta, that the Constitution similarly would not afford a right for religious adherents to withhold the portion of their taxes corresponding to the percentage of the federal budget allocated for "war-related activities." *Id.*

The sincere religious beliefs of the petitioner in the case before us similarly "afford[ ] no basis for resisting" payment of his taxes where, as here, the "broad public interest in maintaining a sound tax system" is not meaningfully disputed, *id.*, and where Congress's constitutional authority to impose the taxes in question is beyond doubt. *See United Public Workers v. Mitchell*, 330 U.S. 75, 96, 67 S.Ct. 556, 91 L.Ed. 754 (1947) ("[W]hen objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail."); *see also Barton v. Comm'r*, 737 F.2d 822, 823 (9th Cir.1984) (rejecting taxpayer's claim that the Ninth Amendment afforded him

the right to withhold taxes allocable for military purposes because, *inter alia*, "Article I, section eight of the Constitution specifically grants Congress the power to collect taxes . . . for the national defense").

We agree with the Ninth Circuit's decision in *Barton*, which held, in a case substantially similar to the one at bar, that the Ninth Amendment did not support an individual's efforts to avoid payment of taxes based on his genuinely held religious objections to military expenditures. *See id.* at 823-24 ("If the specific protections of the first amendment do not afford a basis for refusing to pay tax, then neither can the more novel claims raised by appellant under the ninth amendment."). We hold that petitioner cannot bolster or enhance an unavailing First Amendment argument merely by presenting it in the dress of a Ninth Amendment claim.

Finally, we address petitioner's argument that the Tax Court abused its discretion by assessing a penalty of $5,000 pursuant to 26 U.S.C. § 6673(a)(1), *see* note 4, *ante*. We conclude that no abuse of discretion occurred here. For the reasons stated in our discussion above, any reasonable possibility of petitioner's success on the merits was squarely foreclosed by long-settled case law. Accordingly, the Tax Court properly concluded that petitioner's claims were "frivolous" or "groundless" within the meaning of the statute. 26 U.S.C. § 6673(a)(1); *see Burke v. Comm'r*, 929 F.2d 110, 116 (2d Cir.1991) (affirming imposition of penalties on taxpayer who argued, *inter alia*, that the Tax Court was unconstitutional).

Even assuming that petitioner's one arguably novel claim-namely, his Ninth Amendment argument-was not explicitly and unambiguously foreclosed by existing Second Circuit precedent, we nevertheless find that the Tax Court did not abuse its discretion in assessing the penalty. First, we agree with the Tax Court's conclusion that, despite taking a slightly new form, petitioner's argument was "representative of a class of arguments that have universally been rejected by [the Tax Court] and other courts." *Jenkins v. Comm'r*, No. 20217-03L (Tax Ct. March 3, 2005). Second, the Tax Court's decision to assess a penalty is supported by the fact that petitioner previously raised a similar unsuccessful challenge in Tax Court, in which he argued that the First Amendment afforded him a right to avoid paying taxes allocable for military expenditures. In rejecting his arguments on this previous occasion, the Tax Court explicitly noted that "[i]t is a fundamental principle of tax law that a taxpayer has no right to reduce his Federal tax liability on the ground that governmental policies or expenditures conflict with his religious or moral convictions, no matter how sincerely those convictions may be held." *Jenkins v. Comm'r*, No. 4251-87S (Tax Ct. Dec. 28, 1987). Petitioner therefore received full and adequate notice during the prior action that any future efforts to resist payment of taxes would almost certainly fail. *Cf. Maduakolam v. Columbia Univ.*, 866 F.2d 53, 56 (2d Cir.1989) (reversing the District Court's imposition of sanctions under Fed.R.Civ.P. 11 because there was " *nothing in the record to indicate that [the appellant] knew or should have known* that his motion to reopen case was time-barred" (emphasis added) (internal quotation marks omitted)). Accordingly, the Tax Court did not abuse its discretion when imposing a penalty in the instant case.

Cf. Burke, 929 F.2d at 116 (affirming imposition of a penalty by the Tax Court and noting that "we have recently ruled that sanctions can be imposed pursuant to Fed. R.App. P. 38 where, even if one issue is deemed valid, the bulk of [appellant's] claims are completely devoid of merit" (internal quotation marks omitted)).

* * * *

For the reasons stated above, the decision of the Tax Court is **AFFIRMED**.

APPENDIX B — ORDER AND DECISION OF THE UNITED STATES TAX COURT DATED MARCH 3, 2005

UNITED STATES TAX COURT
Washington, DC 20217

Docket No. 20217-03L.

DANIEL TAYLOR JENKINS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER AND DECISION

Respondent has moved for summary judgment and for imposition of a penalty under section 6673[1] (the motion). Petitioner objects. For the reasons that follow, we shall grant the motion for summary judgment and enter decision for respondent. We shall also impose a penalty against petitioner under section 6673 in the amount of $5,000.

This case is before the Court to review a determination (the determination) made by respondent's Appeals Office (Appeals) that respondent may proceed to collect by levy

1. Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended, and all rule references are to the Tax Court Rules of Practice and Procedure.

the unpaid portion of the income tax petitioner reported on his calendar year 2001. Federal income tax return (the unpaid tax) together with interest and certain statutory additions to the tax. We review the determination pursuant to section 6330(d)(1). Petitioner claims that Appeals erred in refusing to allow him to follow his conscience and refrain from paying the unpaid tax until such time as he may direct that the tax be used to fund only non-military expenditures. Respondent moves for summary judgment in his favor on the ground that petitioner has no right to rely on his own conscience as a basis for not paying tax. Respondent argues that there is no genuine issue of material fact for trial and that a decision may be rendered as a matter of law.

Rule 121 provides for summary judgment. Summary judgment may be granted with respect to all or any part of the legal issues in controversy "if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a decision may be rendered as a matter of law." Rule 121(a) and (b). When a motion for summary judgment is made and properly supported, the adverse party may not rest on mere allegations or denials of the pleadings but must set forth specific facts showing that there is a genuine issue for trial. Rule 121(d).

We are satisfied that there is no genuine issue as to any material fact and that a decision may be rendered as a matter of law. For the reasons that follow, we shall grant the motion.

Appendix B

Background

We draw the following facts from the pleadings, the Declaration of Bruce E. Conte, a settlement officer employed by respondent, in support of respondent's motion (the Conte Declaration) and the exhibits thereto, and "Petitioner's Response in Opposition to Respondent's Motion" (the response). We believe the following facts to be undisputed and so find for purposes of this order and decision.

Petitioner timely filed his 2001 Federal income tax return, reporting a tax due of $4,118.58, but enclosing only a payment in the amount of $1,842.58. A letter attached to the return states that the balance, $2,276.00, had been "put in escrow pending the opportunity to direct tax dollars entirely to non-military government expenditures."

On May 16, 2003 after respondent notified petitioner of his obligation to pay the balance due, penalties, and interest, respondent sent petitioner a Final Notice of Intent to Levy and Notice of Your Right to a Hearing. In response, on June 12, 2003, petitioner timely submitted to Appeals a Request for Collection Due Process Hearing (the request). The request stated only that "[t]he original $2276.00 was escrowed and available since mid-April of 2002."

A telephonic collection due process hearing was held on October 8, 2003 (the hearing). At the hearing, petitioner raised two issues: (1) that the proposed levy would exceed the amount listed in Publication 1494 and (2) that petitioner desired the ability to direct the taxes he pays entirely to non-military government expenditures. As to the first issue, the

settlement officer conducting the hearing for Appeals (the settlement officer) explained that Publication 1494 pertains only to levies on wages, salary, and other income and therefore did not limit respondent's ability to levy on other property. The settlement officer also advised petitioner that failure or refusal to comply with tax laws, even if such failure or refusal is based on moral, religious, political, or similar grounds, could not justify forestalling or averting the proposed levy action. Additionally, petitioner and the settlement officer discussed the fact that penalties might be assessed against petitioner if his position were deemed frivolous or groundless. Petitioner did not challenge the amount or existence of underlying liability he reported on his return. No further issues were raised, nor were any alternative collection actions suggested. The hearing ended with the settlement officer disclosing to petitioner that the proposed levy action would likely be upheld, and petitioner stated that he understood.

On October 23, 2003, Appeals made the determination, sustaining the proposed levy action. Attached to the determination is an explanation of Appeals' action, which, among other things, sets forth relevant facts, confirms that Appeals verified that the requirements of applicable law and administrative procedures had been met, addresses the issues raised by petitioner, and concludes that the proposed collection action balances the need for efficient collection of taxes with the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary.

Appendix B

Discussion

I. *Collection Due Process*

If any person liable for Federal tax liability neglects or refuses to make payment within 10 days of notice and demand, the Commissioner is authorized to collect the tax by levy on that person's property. See sec. 6331(a). As a general rule, at least 30 days before taking such action, the Commissioner must provide the person with a written final notice of intent to levy that describes, among other things, the administrative appeals available to the person. See sec. 6331(d).

Upon request, the person is entitled to an administrative review hearing before Appeals (a collection due process hearing). Sec. 6330(b) (1). The Appeals officer conducting the collection due process hearing must verify that the requirements of any applicable law or administrative procedure have been met. Sec. 6330(c) (1). Section 6330(c) prescribes the relevant matters that a person may raise at the collection due process hearing, including spousal defenses, the appropriateness of respondent's proposed collection action, and possible alternative means of collection. A taxpayer may contest the existence or amount of the underlying tax liability at a collection due process hearing only if the taxpayer did not receive a statutory notice of deficiency with respect to the underlying tax liability or did not otherwise have an opportunity to dispute that liability. Sec. 6330 (c) (2) (B).

Appendix B

Following the collection due process hearing, the Appeals officer must determine whether the collection action is to proceed, taking into account the verification the Appeals officer has made, the issues raised by the taxpayer at the hearing, and whether the collection action, "balances the need for the efficient collection of taxes with the legitimate concern of the * * * [taxpayer] that any collection action be no more intrusive than necessary." Sec. 6330 (c) (3). We have jurisdiction to review such determinations where we have jurisdiction over the type of tax involved in the case. Sec. 6330 (d) (1) (A); see *Iannone v. Commissioner*, 122 T.C. 287, 290 (2004).

II. *Petitioner's Request for Relief*

While petitioner claims that there are genuine issues of fact for trial, he frames the issue before the Court as follows:

> The issue before this Court is the constitutionality of Title 26 of the U.S. Code [the Internal Revenue Code], or any particular section thereof, to the extent it is being applied to compel persons to violate their protected liberties and rights of individual conscience, as written or as currently administered by the Internal Revenue Service. * * *

We see no issue of fact and dispose summarily of petitioner's claim that the Constitution allows him to retain the unpaid tax in an escrow account until such time as it "can be directed to non-military expenditures." That claim has no merit. It is representative of a class of arguments that

have been universally rejected by this and other courts. See, e.g., *United States v. Lee*, 455 U.S. 252, 260 (1982) ("The tax system could not function if [religious] denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."); *Tingle v. Commissioner*, 73 T.C. 816 (1980) (The Ninth Amendment was not intended to abridge the specific power of Congress to lay and collect taxes from whatever source derived and does not protect acts of conscience which contest the appropriation of the revenue.)

Appeals committed no error in rejecting petitioner's claim.

III. *Section 6673 Penalty*

Respondent urges this court to impose a section 6673 penalty upon petitioner. Section 6673 (a) (1) permits the Court to impose a penalty on a taxpayer, not to exceed $25,000, if the Court finds: (1) that the proceedings brought by the taxpayer were brought primarily for delay; (2) that the taxpayer's position is frivolous or groundless; or (3) that the taxpayer did not reasonably pursue available administrative remedies. Section 6673 (a) (1) is applicable to collection due process proceedings. *Pierson v. Commissioner*, 115 T.C. 576 (2000).

The purpose of section 6673 "is to compel taxpayers to think and to conform their conduct to settled principles before they file returns and litigate." *Coleman v. Commissioner*, 791 F.2d 68, 71 (7th Cir. 1986); see also *Grasselli v. Commissioner*, T.C. Memo. 1994-581 (quoting *Coleman*).

Appendix B

A taxpayer's position is frivolous if it is contrary to established law and unsupported by a reasoned, colorable argument for change in the law. E.g., *Nis Family Trust v. Commissioner*, 115 T.C. 523, 544 (2000). We need not find specific damages to invoke section 6673 (a) (1); rather, that section is a penalty provision, intended to deter and penalize frivolous claims and positions in proceedings before the Tax Court. See *Bagby v. Commissioner*, 102 T.C. 596, 613-614 (1994).

We believe that petitioner's position is frivolous under the definition set forth above. Moreover, this is not the first time that petitioner has appeared before this Court, nor is it the first time he has adopted the position he has in this case. In *Jenkins v. Commissioner*, T.C. Summary Opinion 1987-322, petitioner claimed a credit on his 1985 income tax return based upon his conscientious opposition to military expenditures. Petitioner indicated that the amount that respondent asserted he owed would be held in escrow. *Id.* This court disallowed the credit, but it declined to impose a penalty under section 6673. *Id.*

We believe a penalty under section 6673 is now appropriate. Not only did petitioner's prior proceedings before this court serve to warn him that his arguments were without merit, the settlement officer who conducted the hearing also reminded petitioner of the possible sanctions he might face by petitioning this court. Accordingly, because we deem petitioner's position to be frivolous, we impose upon petitioner a penalty of $5,000.

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IV. *Conclusion*

Petitioner has failed to show any error in Appeals' determination to proceed to collect by levy the unpaid tax. Further, petitioner's position is deemed to be frivolous for purposes of section 6673 (a) (1) (B), and this court shall impose a penalty upon him in the amount of $5,000.

For the foregoing reasons, it is hereby

ORDERED that petitioner's motion for continuance filed February 22, 2005, is deemed moot. It is further

ORDERED that this case is stricken from the March 14, 2005, New York, New York, Trial Session of the Court. It is further

ORDERED that respondent's motion for summary judgment is granted. It is further

ORDERED that petitioner shall pay to the United States a penalty in the amount of $5,000. It is further

ORDERED AND DECIDED that respondent may proceed with the collection action for the taxable year 2001 as determined in the Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated October 23, 2003, upon which this case is based.

s/ James S. Halpern
James S. Halpern Judge
Judge

ENTERED: MAR -3 2005

(2)

No. 06-1624

FILED
JUL 5 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DANIEL TAYLOR JENKINS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF NEW YORK YEARLY MEETING OF THE RELIGIOUS SOCIETY OF FRIENDS IN SUPPORT OF PETITIONER

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BRIEF OF NEW YORK YEARLY MEETING AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER-APPELLANT

New York Yearly Meeting ("NYYM") of the Religious Society of Friends (also known as "Quakers") submits this brief, pursuant to Rule 37.2(a) of the Court's Rules, as a Friend of the Court[1] in support of the petition for a writ of certiorari of Petitioner-Appellant Daniel Taylor Jenkins to review the decision of the court below affirming summary judgment for Defendant-Appellee Commissioner of Internal Revenue and imposition of a penalty under section 6673 of the Internal Revenue Code of 1986. Petitioner-Appellant Daniel Jenkins has consented to NYYM's filing of the Amicus Brief, but the Solicitor General's office, in response to a request for consent, has declined to consent.

Statement of Interest of the *Amicus Curiae*

The peace testimony, or living out a commitment to peace, is a central tenet of the Quaker religion. Daniel Jenkins' refusal to pay taxes supporting war is an essential expression of his peace testimony. The Religious Society of Friends has a long history, tradition and practice of sincere opposition to warfare founded on deeply held religious beliefs and a history of advocating alternatives to violence for settling conflicts. The Daniel Jenkins case is one that presents these two core Quaker principles. Daniel Jenkins attends and is supported by a Clearness Committee of the Saranac Lake (New York) Monthly Meeting, which is one of

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[1] This brief is not authored in whole or in part by counsel for both parties, and no monetary contribution was made in support of its preparation or submission by any person or entity other than amicus and its counsel.

the local Quaker Meetings (congregations) within NYYM. On April 14, 2007, NYYM approved a minute to submit an amicus brief in support of Daniel Jenkins' petition for a writ of certiorari.[2]

The Quaker peace testimony significantly contributed to the development of the nation's conception of freedom of religion, and maintains an influential place in the national ethos.[3] Some of that history is described in Point A below.

This Court has instructed that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 884 (1990), quoting Bowen v. Roy, 476 U.S. 693, 708 (1986) (plurality). Congress recognized this as the current policy of the United States in enacting the Religious Freedom Restoration Act, which requires the least restrictive feasible burden on exercise of religion.

The history of governmental acknowledgment of Quaker testimonies and witness demonstrates that requests for accommodation of religious conscience should be afforded careful consideration before being rejected on the basis of inchoate fears of pandemonium or burden. Some of that history of accommodation is summarized in Point C, below.

Quaker practice shares with the American judicial system belief in, and reliance upon, process - faith in the force of reason and reasoning together - to assure correct and

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[2] New York Yearly Meeting (NYYM) of the Religious Society of Friends, Minutes of Spring Sessions 2007 at 5, www.nyym.org.

[3] See John T. Noonan, Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* (Univ. Calif. Press, 1998) (hereinafter cited as "Noonan"), at 51-54, 72-74, 89-91, 222; City of Boerne v. Flores, 521 U.S. 507, 557-560 (1997)(O'Connor, J., dissenting).

legitimate outcomes on a case-by-case basis. The apparent unwillingness or failure of the courts below to provide a discerning and particularized consideration of the merits of Daniel Jenkins' claim, as detailed in his petition, is a matter of great concern to Quakers because it suggests an improper judicial toleration of an infringement of religious conscience. Cf. Cassius Marsellus Clay, Jr. v. United States, 403 U.S. 698 (1971) (Conscientious objector determinations must be made on an individualized basis and not through application of a presumption or "rule of law" as to applicant's religious sincerity). As Judge John T. Noonan explains in discussing James Madison and the intent of the Religion Clauses:

> In the ultimate and absolute relation of each individual to God lies the limitation on civil society and civil government on which JM insists. Without that relation, why should the individual not be absorbed by the community, why should a society be constrained to respect conscience? With that relation to a Creator, Governor, Judge in existence for each individual, with that personal responsibility to a personal God, a government of human beings must be a government of limited powers.[4]

Modern Constitutional analysis, particularly as to the Religion Clauses, frequently employs a substantial historical review to discern the probable intent of the Framers. See, e.g., Lynch v. Donnelly, 465 U.S. 668, 673 (1984). In this spirit, the discussion below highlights (i) the history and religious character of the Society of Friends' opposition to warfare, including Quakers' peace tax witness, and (ii) the

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[4] Noonan at 89.

long history of governmental acknowledgment of Friends' practices and beliefs in recognition of the mandate of the First Amendment's Free Exercise of Religion Clause.

ARGUMENT

A. WAR AND THE SUPPORT OF WAR VIOLATE THE QUAKER RELIGIOUS CONVICTION

On April 1, 2006, NYYM approved the following minute:

> The Living Spirit works in the world to give life, joy, peace and prosperity through love, integrity and compassionate justice among people. We are united in this Power. **We acknowledge that paying for war violates our religious conviction.** We will seek ways to witness to this religious conviction in each of our communities [emphasis added].[5]

Quaker "minutes" are recorded decisions, based on a unity of spirit upon plenary consideration of a matter. This minute was approved in the context of a long history of Quaker objection to warfare, based on religious faith and practice. The Quaker peace testimony began with a 1661 declaration by English Quakers to King Charles I that:

> We do utterly deny all outward wars and strife and fightings with outward weapons, for any end or under any pretense whatsoever. And this is our testimony to the whole world... The spirit of Christ, by which we are guided, is not changeable, so as once to command us from a thing as evil and again to move unto it; we do certainly know, and do testify to the world,

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[5] New York Yearly Meeting (NYYM) of the Religious Society of Friends, Minutes of Spring Sessions 2006 at 3.

> that the spirit of Christ, which leads us into all Truth, will never more move us to fight and war against any man with outward weapons, neither for the Kingdom of Christ, nor for Kingdoms of this world.[6]

The Quaker understanding of peace comes primarily from the life and ministry of Jesus Christ,[7] who taught his hearers at the Sermon on the Mount not to fight but to love and pray for their enemies.[8] To become a member of this Person of Christ is to become incapable of waging war, for wars "come from uncontrolled desires, and the determination to snatch by force what God may not be granting."[9] The biblical and theological basis of Quaker conscientious objection to all wars was first documented by Quaker theologian Robert Barclay in 1676. Barclay wrote that "War is absolutely unlawful for those who would be disciples of Christ. . . Christ says that 'we should love our enemies' but war teaches us to hate and destroy them."[10] To turn away

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[6] Declaration "Against All Plotters and Fighters in the World" addressed to Charles II by George Fox, Richard Hubberthorne and 10 other Friends, January 21, 1661; quoted in John L. Nickalls, ed., *The Journal of George Fox* (London: Cambridge University Press 1952)(hereinafter cited as "Journal of George Fox") at 399-400; see also Peter Brock, The Quaker Peace Testimony 1660 to 1914 (Sessions Book Trust, York, England 1990) (hereinafter cited as "Brock"), at 25.

[7] Sandra Cronk, *A Study of the Spiritual Basis of the Quaker Peace Testimony* (Philadelphia, Tract Association of Friends, 1984)(hereinafter cited as "Cronk") at 4.

[8] *New Revised Standard Version – Holy Bible*, (New York, Oxford University Press, 1989) Matt. 5:43-45 (hereinafter cited as "Holy Bible"), as quoted in John Edminster, *Jesus Christ Forbids War* (New York, 2005)(hereinafter cited as "Edminster") at 1.

[9] Holy Bible, James 4:1-3 as quoted in Edminster at 1.

[10] Robert Barclay, *An Apology for the True Christian Divinity* (1676) quoted at Dean Freiday, ed., *Barclay's Apology in Modern*

from such destructive desires, Quakers believe in turning toward a Power, a "Living Spirit" that "works in the world to give life, joy, peace and prosperity"[11]. George Fox, the founder of the Quaker movement, encountered that Spirit when an inner voice declared to him "There is one, even Christ Jesus, that can speak to thy condition."[12] Fox found that by coming into relationship with Christ, his life was transformed and as a result, the occasion of war had been removed from his life.[13] When Commonwealth commissioners asked Fox to accept an officer's commission in the militia, he responded:

> I told them I lived in the virtue of that life and power that took away the occasion of all wars and I knew from whence all wars did rise, from the lust according to James's doctrine ... I told them I was come into the covenant of peace which was before wars and strifes were.[14]

This quotation and the above 1661 declaration to Charles I have been familiar and treasured passages to generations of Quakers. As expressions of the peace testimony, these statements along with Barclay's exposition of pacifism in the Apology formed the foundation for a firm stance of conscientious objection to war as the "established practice of the Society of Friends."[15]

English (Newberg Oregon, The Barclay Press, 1991)(hereinafter cited as "Barclay") at 427.

11 NYYM, footnote 5, at 3.

12 *The Journal of George Fox* at 11.

13 Cronk at 13.

14 See Cronk at 11 and Brock at 14.

15 See Brock at 31

For Quakers, beliefs and action are necessarily integrated. Friends seek to make real their faith and concerns through personal acts ("witness and testimony"). The peace testimony calls Quakers to personal witness to support the end of warfare and the promotion of nonviolent alternatives for resolving disputes. This is reflected in Advice # 14 of NYYM's *Faith and Practice*:

> Friends are earnestly cautioned against the taking of arms against any person, since "all outward wars and strife and fightings with outward weapons" are contrary to our Christian testimony. Friends should beware of supporting preparations for war even indirectly, and should examine in this light such matters as non-combatant military service, cooperation with conscription, employment or investment in war industries, and **voluntary payment of war taxes** . . . . Friends are advised to maintain our testimony against war by endeavoring to exert an influence in favor of peaceful principles and the settlement of all differences by peaceful methods. They should lend support to all that strengthens international friendship and understanding and give active help to movements that substitute cooperation and justice for force and intimidation [emphasis added].[16]

This Advice and the NYYM minute reflect the Quaker understanding that coerced participation in military activities

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[16] New York Yearly Meeting of the Religious Society of Friends (Quakers), *Faith and Practice: The Book of Discipline of the New York Yearly Meeting of the Religious Society of Friends* (New York, 1998) at 60-61.

is an affront to the Quaker peace testimony, since "paying for war violates our religious conviction"[17] and "we do utterly deny all outward wars and strife and fightings with outward weapons, for any end or under any pretense whatsoever"[18]. In response to arguments that Quakers as citizens are obligated to pay for war along with other government obligations, Friend Samuel Allinson argued in 1780 that "war was a state closer to anarchy than to government or law, and that all the obligations that a citizen may tacitly incur does not oblige him to support the antithesis of civil society."[19] He concluded that "if we [Quakers] are forbidden . . . . personally to engage in war . . . . we ought not mediately to promote it by actively giving our money to that use."[20]

NYYM previously registered these concerns in federal court, when it filed two amicus briefs in *Packard v. United States*, 7 F.Supp.2d 143(2d Cir. 1999), another case concerning an individual's refusal to pay taxes for military purposes.

B. THE QUAKER PEACE TESTIMONY AND WITNESS AGAINST WAR

The Framers of the Constitution, meeting in Philadelphia in 1787, were familiar with the beliefs and practices of Quakers, for Philadelphia was not only the capital of the confederated states, but also the major population center of Quakers in North America.[21] The Quakers were well-known not only for

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17 NYYM, footnote 5 at 3.

18 Brock, footnote 6.

19 Allinson Papers, Box 11B, 1780, as quoted in Jack D Marietta, *The Reformation of American Quakerism 1748-1783* (University of Pennsylvania Press, Philadelphia, 1984) at 264 (hereinafter cited as "Marietta").

20 See Marietta at 262.

21 Hugh Barbour and J. William Frost, *The Quakers* (New York, Westport, London: Greenwood Press 1988) at 154 (hereinafter

their refusals based on religious scruples to serve in military units, but also for refusing to cooperate with requisitions for military use, to the extent of even refusing to sell or to grind grain for George Washington's army.[22] No doubt some of the convention delegates knew about the accommodations that various states, notably New York, had made to Quakers by granting them exemptions from military service (below at Point C). In this context, what would have been the Framers' "original intent" concerning such accommodations of religious beliefs? It is entirely reasonable that they would have provided exemptions from paying military taxes to those whose religious beliefs forbade them from supporting military activities. There was no income tax, standing army or universal conscription during that period. After the Revolution, requisitions of troops and materiel were reserved to the state militias and the state militia laws usually provided exemptions to Quakers.[23] The Framers knew that the federal government would not be collecting taxes for military purposes, or otherwise forcing the population's support of war activities. Rather, the state and confederation governments supported liberty of conscience by accommodating religious beliefs that preclude individuals from participation in war (below at Point C).

An evolving expression of the peace testimony, known as "tax witness" is the refusal to pay taxes levied and expended for military purposes. For nearly three hundred years, Friends have had their religion burdened by the inconsistency of paying for a war effort while refusing to otherwise participate

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cited as "The Quakers"), and Allen C. Thomas, *A History of the Friends In America* (Philadelphia, John C. Winston Co., 1919) at 103.

[22] Brock at 148.

[23] Brock at 156.

in warfare.[24] Refusal to pay war taxes in the United States was mostly practiced in the historic peace churches, including the Quakers, the Shakers, the Mennonites and the Brethren before World War II.[25] The Quakers were opposed to paying for war as long ago as colonial times and during the Revolutionary War (1670s – 1783)[26]. For example, in 1755, while the Pennsylvania Assembly was debating raising funds "for the king's use" in the French and Indian War, a delegation of 20 Quakers addressed the Assembly in opposition to the raising of money for the war. They expressed willingness to pay taxes for peaceable purposes, such as "to cultivate our friendship with our Indian neighbors and to support such of our fellow subjects who are or may be in distress"; but with respect to monies destined for war purposes, they warned that "many among us will be under the necessity of suffering rather than consenting thereto by the payment of a tax for such purposes".[27]

When the tax to funding the war became law, these Friends published "An Epistle of Tender Love and Caution to Friends in Pennsylvania" to explain the basis for this testimony and to encourage others to follow their faith in refusing to contribute to war taxes:

> And being painfully apprehensive that the large sum granted by the late Act of Assembly for the King's use is principally intended for

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24 See Brock at 184-196.

25 Ruth Benn and Ed Hedemann, *War Tax Resistance: A Guide to Withholding Your Support from the Military* (New York, War Resisters League, 2003)(hereinafter cited as "Benn") at 72.

26 Brock at 184-196

27 Brock at 117.

> purposes inconsistent with our peaceable testimony, we therefore think that as we cannot be concerned in wars and fightings, so neither ought we to contribute thereto by paying the tax directed by the said Act.[28]

In 1776, during the Revolutionary War, Philadelphia Yearly Meeting approved a minute "that a tax levied for the purchasing of drums, colours, and other warlike purposes, cannot be paid consistent with our Christian testimony."[29] Similar positions were expressed in opposition to taxes imposed to retire the debt from the Revolutionary War, import duties used[30] to finance the War of 1812, and to a lesser extent, taxes imposed during the Civil War.

In 1821, Quakers in New York State presented a memorial to the state Constitutional Convention requesting an amendment that would exempt Quakers not only from

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[28] *The Journal and Major Essays of John Woolman*, Phillips P. Moulton, ed. (New York, 1971), at 85-86; quoted and discussed in Brock at 118.

[29] Quoted in Brock at 190. Two years later another broader minute was approved which declared: *We find in several different quarters a religious scruple hath appeared and increases among Friends, against the payment of taxes, imposed for the purpose of carrying on the present war; they being deeply concerned and engaged faithfully to maintain our Christian testimony against joining with or supporting the spirit of wars and fightings, which hath remarkably tended to unite us in a deep sympathy with the seed of life in their hearts.... [Friends are urged] to avoid complying with the injunctions and requisitions made for the purpose of carry on war, which may produce uneasiness to themselves and tend to increase the sufferings of their brethren.*

[30] See Brock at 194-196.

bearing arms, but also "from incurring any fine or penalty in lieu thereof." [31] The memorial explained that:

> The obligation they feel themselves under, not to comply with any military requisitions, nor to pay any equivalent, is founded . . . not only on the doctrines of the Christian religion, but derived from the undeniable dictates and the unalienable rights of conscience, which can neither be communicated nor controlled by human authority; but which belongs essentially to the relation existing between man and his Creator.[32]

In 1841, New York Quakers presented a Memorial and Remonstrance to the State Assembly requesting that members of the Society be exempted from fine or imprisonment for non-performance of military duty (including payment of the militia commutation tax).[33] The Report of the Assembly's Committee on the Militia and Public Defense noted:

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[31] *Reports of the Proceedings and Debates of the Convention of 1821 Assembled for the Purpose of Amending the Constitution of the State of New York*, Albany, 1821 (hereinafter cited as "*Reports of 1821 Convention*") at 575.

[32] *Reports of 1821 Convention* at 575.

[33] *New York Assembly Committee on the Militia and Public Defense, Report No. 170, on the Memorial and Remonstrance of the Religious Society of Friends in the State of New York*, March 4, 1841 (hereinafter cited as "*1841 Assembly Committee Report*") at 1.

> That they [the Quakers] have given to the subject such consideration as its importance and the highly respectable character of the memorialists seemed to demand. The memorial contains an eloquent and elaborate defense of the conscientious objections entertained by the Religious Society of Friends in the State of New York, against bearing arms, or in any manner sustaining or countenancing war.[34]

During the last thirty-five years, Quaker organizations have sought to support individual refusals to pay taxes destined for military purposes. For example, many Friends and Quaker organizations, including New York Yearly Meeting, refused to pay the federal telephone tax imposed to help finance the Vietnam War.[35] As well, the American Friends Service Committee objected to being compelled to withhold taxes from the wages of Quaker employees who were refusing to pay taxes being used, in part, to fund warfare.[36] And Philadelphia Yearly Meeting refused to comply with levies on wages of employees who were engaging in war tax protests.[37]. Similarly, NYYM has a recorded minute supporting NYYM staff who choose not to

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[34] *1841 Assembly Committee Report* at 1.

[35] *Quaker Crosscurrents: 300 Years of Friends in the New York Yearly Meetings*, Hugh Barbour, ed. (Syracuse Univ. Press, 1995) (hereinafter cited as "*Quaker Crosscurrents*"), at 313.

[36] *American Friends Service Committee v. United States*, 368 F.Supp. 1176 (E.D.Pa. 1973) rev'd on procedural grounds, 419 U.S. 7 (3rd Cir. 1974)(per curiam)

[37] *United States v. Philadelphia Yearly Meeting*, 753 F.Supp. 1300 (E.D.Pa. 1990)

pay a portion of their taxes for reasons of conscience.[38] In addition, in February 1991, Purchase Quarterly Meeting, a constituent meeting of NYYM, established the Peace Tax Escrow Fund utilized by tax witnesses, and continues to administer the Fund. Purchase Monthly Meeting regularly records the amount of interest and penalties seized from tax witnesses as a minute of suffering for religious conscience.[39]

Similarly, Northeastern Regional Meeting and Saranac Lake Monthly Meeting have united in support of the testimony of Appellant Daniel Jenkins in this case.[40]

Conscientious objection to military service, as exhibited by Fox's refusal (supra, pp. 5), is the oldest and most familiar expression of Friends' peace testimony. By the middle of the eighteenth century, the absolute refusal of Quakers to fight was so familiar that at least five colonies -- New York, Virginia, Massachusetts, North Carolina and Rhode Island -- allowed Quakers to be exempted from the military service obligatory for other able-bodied males. (Pennsylvania, more heavily Quaker, did not even adopt a

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[38] *Minutes and Proceedings of the 276th/277th Sessions of New York Yearly Meeting of the Religious Society of Friends*, Minute #117, at 23 & Minute #20, at 73 (July 25-August 1, 1971 & July 30-August 6, 1972).

[39] New York Yearly Meeting of the Religious Society of Friends, *Brief Amicus Curiae*, *Packard v. United States*, 7 F.Supp.2d 143 (2d Cir. 1999) at 9.

[40] Saranac Lake Monthly Meeting, NYYM of Religious Society of Friends, *Minutes of February 19, 2006* and Northeastern Regional Meeting, NYYM of Religious Society of Friends, *Minutes of February 25, 2006*.

military conscription act until 1775.)[41] Conscientious objection by Quakers in the United States has continued to be an important expression of the peace testimony in all the major wars, from the Revolution to the present.[42]

The peace testimony has also led to witness against war by actions reflective of Friends' belief that no human being can be deemed an "enemy". For example, Quakers worldwide were awarded the Nobel Peace Prize in 1947 for their postwar relief work. As they have done in numerous violent conflicts over three centuries, Friends acted to provide medical supplies and other relief assistance to all sides during the Vietnam War and the more recent struggles in Bosnia, Rwanda and Iraq. Quaker advocacy groups in Washington (Friends Committee on National Legislation) and in New York and Geneva (Quaker United Nations Office) also work actively with Congress and the United Nations to develop alternatives to force and coercion in national and international affairs.[43] Thus, the Quaker peace testimony is only in part a refusal of war; it is a broader tenet about actively respecting and supporting life.

C. RELIGIOUS BELIEFS AND PRACTICES HAVE BEEN REPEATEDLY ACCOMMODATED BY GOVERNMENTS IN THE PAST

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41 Brock at 48.

42 See, *e.g.*, Brock at 142-183 & 290-298.

43 Quaker Crosscurrents at 253, 281, 304-307, 312.

Exemptions not only from military service, but also from taxation to support the military, have been enacted with no adverse effects.

Quaker opposition to military service was recognized and accommodated even during the American Colonial and Revolutionary War eras, and exemptions from military service on grounds of religious conscience have been continued to the present. At least five colonies exempted Quakers from military service.[44] During the Revolutionary War, both the Continental Congress and colonial governments afforded exemption from military service for Quakers and other religious conscientious objectors.[45] The New York State Constitution of 1777 specifically mentioned Quakers and included the right to refuse to bear arms due to religious scruples.[46] On the Federal level, conscientious objection to military service has long received governmental recognition.[47] When the first federal universal military

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[44] Brock at 48.

[45] Brock at 146-147; see, *e.g.*, *Sessions Laws of the State of New York: 1777-1784*, Vol. I, at 49.

[46] Quaker Crosscurrents at 53. *New York State Constitution of 1777* at Article 40 states "That all such inhabitants of this State, being of the people called Quakers as, from their scruples of conscience, may be averse to the bearing of arms, be therefrom excused by the legislature, and do pay to the state such sums of money, in lieu of their personal service, as the same; may in the judgement of the legislature, be worth."

[47] Indeed, James Madison even attempted to include a clause for exempting conscientious objectors in the Bill of Rights. See Brock at 156.

service draft was enacted during the Civil War, Congress adopted acts in March, 1863 and February, 1864 exempting from service "members of religious denominations, who shall by oath or affirmation declare that they are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice of said religious denominations...."[48] Every subsequent draft law has included various exemptions for persons whose religious conscience precluded their accepting military service.[49]

Colonial and later state governments, starting in 1683, provided exemptions from paying taxes or contributions levied for military purposes to persons whose religious scruples preventing them from making such payments. The East New Jersey Constitution had the following provisions:

> . . . . none of the Proprietors and other inhabitants may be forced to contribute any money for the use of arms, to which conscience sake they have not the freedom . . . [but] shall on the other hand bear so much in other charges, as may make up that portion in the general charge of the Province."[50]

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[48] See Brock at 169. These acts generally required the provision of some alternative civilian service or the payment of a commutation or substitution fee.

[49] See, *e.g.*, *United States v. Seeger*, 380 U.S. 163, 170-171 (1965); *United States v. Geary* , 368 F.2d 144, 147-148 (2d Cir. 1966); Military Selective Service Act, § 6(j), 50 U.S.C. (App.) § 456(j).

[50] Avalon Project, *Fundamental Constitutions for the Province of East New Jersey in North America, Anno Domini 1683* (New Haven, Yale University, 2006) at Section VII.

Note that by having those exempted "bear so much in other charges", the taxes were being redirected to non-military purposes, not cancelled or forgiven. Daniel Jenkins has requested that the portion of his taxes in dispute, which have been placed in an escrow account, be similarly redirected; he has not requested a reduction or refund.

Quakers persistently petitioned New York authorities for exemptions from paying taxes or commutation fees levied for military purposes. This resulted in New York providing sometime before 1841 that militia commutation taxes not be used for military purposes, but rather be paid into county treasuries, as noted in the New York Assembly Militia and Public Defense Committee report responding to the 1841 Memorial and Remonstrance (see Point B above). The Committee report noted that the state law at that time not only relieved "...every person conscientiously averse to bearing arms...", but also "...from all liability to contribute, even indirectly, to military purposes."[51] Similarly, Congress during the Civil War specifically accommodated Quaker conscientious objections to the payment of "war taxes" by providing that the commutation fee to be paid for exemption from military service was to be applied solely to humanitarian purposes.[52] These two examples represent significant statutory acknowledgements by state and federal authorities of the need to accommodate liberty of conscience.

The success of such prior governmental accommodation of Quaker testimonies demonstrates that providing exemptions from military requisitions to

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[51] 1841 Assembly Committee Report at 3.

[52] See Brock at 169-170. The Act provided that conscientious objectors who chose not to perform alternative civilian service "shall pay the sum of three hundred dollars... to be applied to the benefit of the sick and wounded soldiers."

accommodate religious beliefs need not result in imposition of a burden in the administration of taxes.

As indicated by the examples above, the federal income tax can be administered so as to accommodate the peace testimony. In 1972, legislation was first introduced to do just that: create a Peace Tax Fund, to permit conscientious objectors to direct the portion of their taxes normally spent for military purposes to non-military programs. Implementation could be as simple as the tax diversion check-box on the current IRS Form 1040, which has for years earmarked tax dollars for election campaign financing. Peace Tax Fund legislation has been introduced in every Congress since then.[53] NYYM supports the National Campaign for a Peace Tax Fund and appoints representatives to serve on its national board.[54]

Religious Freedom Restoration Act's mandate to utilize "the least restrictive means"[55] would appear to support the accommodation of Quaker belief in this circumstance. Since the Federal Government was able to accommodate the Quaker peace testimony during the Civil War by allocating commutation fees to humanitarian purposes, and the Internal Revenue Service today is able to administer the voluntary campaign finance check-off without suffering undue burden, surely Daniel Jenkins' tax witness may be accommodated

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[53] Benn at 125.

[54] New York Yearly Meeting of the Religious Society of Friends, *NYYM Yearbook Directory 2005: Proceedings and Appointments* (New York, 2005) at 59.

[55] 42 U.S.C. § 2000bb-1(b)(2).

pursuant to the Religious Freedom Restoration Act. He paid all his taxes into escrow in this hope and expectation.

The long history of multifaceted governmental accommodation of Friends' and other religious communities' practices reflects the profound respect for acts of religious conscience protected from disparagement by the First and Ninth Amendments and the Religious Freedom Restoration Act. Because accommodation entails modification of rules or requirements of general application, requests for accommodation may appear burdensome or unmanageable to the magistrate or administrator saddled with responsibility for executing a law. But the nearly three hundred years of history of government accommodation cited above shows that it can be done.

D. CONCLUSION

For all the foregoing reasons, together with those set forth in the briefs of Petitioner-Appellant Daniel T. Jenkins, Amicus Curiae New York Yearly Meeting of the Religious Society of Friends urges the Court to grant the petition for a writ of certiorari.

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Respectfully submitted,

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